87-2126

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

No.

STAR COLOR PLATE SERVICE,
DIVISION OF
EINHORN ENTERPRISES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
AND LOCAL ONE,
AMALGAMATED LITHOGRAPHERS
OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether Star Color was properly ordered to bargain on demand with Local One, in derogation of the employees' right to refrain from union representation as guaranteed by Section 7 of the National Labor Relations Act, 29 U.S.C. Section 157, where only two of the twenty present employees actually voted in the ancient election due to the Board's egregious delay.

2. Whether the Court of Appeals for the Second Circuit improperly concluded that fewer policies of the National Labor Relations Act are frustrated by enforcement rather than by nonenforcement of the bargaining order, based upon erroneous conclusions of law and improper balancing of equities.

3. Whether Star Color was properly ordered to bargain on demand with Local 1, where the Court failed to remand the case to the Board to determine the appropriateness of a bargaining order upon employees who do not necessarily support the Union.

DESIGNATION OF CORPORATE RELATIONSHIPS

Star Color Plate Service, filing this Petition for a Writ of Certiorari as Petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Its full name is Star Color Plate Service, Inc.

Star Color Plate Service, Inc. is not owned by any parent corporation.

Star Color Plate Service, Inc. does not have an ownership interest in any subsidiaries.

Star Color Plate Service, Inc. does not have any affiliates.

(Dated: June 15, 1988)

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Star Color Plate Service, Division of Einhorn Enterprises, Inc., prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit issued in this case on March 30, 1988, insofar as and to the extent that decision granted the application of the National Labor Relations Board (the "Board") to enforce its order herein dated November 24, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Appendix, infra.), affirming the decision of the National Labor Relations Board, is officially reported at 843 F.2d 1507. The Decision and Order of the National Labor Relations Board is reported at 282 NLRB No. 31.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was filed on April 26, 1988. (App. B, infra).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended 61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. § 151 et seq. are the following:

National Labor Relations Act §7, 29 U.S.C. § 157:

Right of employees as to organization, collective bargaining, etc.

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in §158(a) (3) of this title.

National Labor Relations Act § 9(c) (1) and 9(c) (3), 29 U.S.C. § 159(c) (1) and (3):

Representatives and elections—
Exclusive representatives; employees' adjustment of grievances directly with employer

* * *

Hearings on questions affecting commerce; rules and regulations (c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to

him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * *

STATEMENT OF THE CASE

Petitioner, Star Color Plate Service, Division of Einhorn Enterprises, Inc., (hereinafter, "Star Color" or "the Employer") is a New York corporation engaged in lithographic production services. On August 29, 1980, the respondent, Local 1, Amalgamated Lithographers of America, International Typographical Union, AFL-CIO (hereinafter, the "Union" or "Local 1") filed a representation petition with the National Labor Relations Board, Region 29, in which it sought to represent Star Color's lithographic production employees. A representation election was directed on March 5, 1981, and was conducted on March 31, 1981. The result was 6 votes for the Union, 5 votes for the company, and 15 votes were challenged.

The respondent Union challenged 14 ballots of voters. On June 30, 1981, the Regional Director ordered that a hearing take place on the challenges of six votes, that the challenge to one vote be deferred, that the challenge to the ballots of seven voters be sustained, and that the challenge to one voter be overruled.

The respondent, not the Employer, requested review of the Regional Director's decision. Hearings were then conducted during the latter part of 1981 and during the month of January 1982.

The Administrative Law Judge (hereinafter "ALJ") did not issue a decision until March 17, 1983, approximately two years after the election. Challenges to the contested ballots were sustained. Star Color filed timely exceptions and a supporting brief with the NLRB on or about April 8, 1983. The General Counsel and the Union filed cross-exceptions and supporting briefs.

On April 28, 1986, more than three years after the ALJ's decision and more than five years after the actual election, the Board certified the Union as the exclusive bargaining representative in the appropriate unit. The Board unnecessarily and with no apparent concern for the impact that its outrageous delay would have on the question of the rights of the employees held the case for three years and one month. This glaring lapse of time was in no way caused by the Employer.

Shortly thereafter, the Company, on May 20, 1986, timely filed with the Board a motion for reconsideration and/or to reopen the record and for a stay of enforcement of the Board's decision. The Company sought to introduce evidence showing that there had been a significant turnover in the appropriate bargaining unit. Specifically, the data indicated that only two of the 18 employees in the appropriate bargaining unit at the time of the election remained at the Company. The Company contended that a certification in 1986 of a 1981 election was inappropriate because the Union did not necessarily have the support of a majority of the unit employees. The employees would be saddled with a Union of which they never had any knowledge.

The Board denied the Employer's motion. There was no discussion; there was no analysis; there was no factfinding. The Board's decision summarily and cursorily denied the motion as lacking merit. Star Color was given no opportunity to argue nor present evidence that was unavailable at the time of the prior proceeding.

The General Counsel then transferred the case to the Board for Partial Summary Judgment. The Employer in its Opposition to Summary Judgment raised the never-litigated issue of whether it can properly refuse to bargain based upon

the five year hiatus between the representation election and the bargaining order in light of changed factors.

The Board granted General Counsel's motion for Partial Summary Judgment, stating that all issues raised by the Company were or could have been litigated in the prior representation proceeding. (This rationale failed to consider that it is impossible to raise conditions as they exist in 1986 in an earlier 1981 proceeding). Despite the fact that the granting of summary judgment resulted in the total absence of an opportunity for the Employer to be heard with respect to the underlying unresolved issues, the NLRB issued its decision and order reported at 282 NLRB No. 31, on November 24, 1986 (5 yrs and 8 months after the initial election). [App. C infra.]

On September 15, 1987, the Board filed an application with the Second Circuit Court of Appeals for enforcement of its bargaining order. The case was orally argued on January 6, 1988 and the Court rendered its decision on March 30, 1988. (App. A. infra.) Because the Court concluded that fewer policies were frustrated by enforcement than by nonenforcement, the Court enforced the bargaining order. The Court admitted that its decision is contrary to the policies of the Act but sought to mitigate that result by requiring the Board to give actual notice to the employees of their decertification rights. However, the Court did not specify when the employees could exercise those rights. The judgment was filed on April 26, 1988. (App. B infra).

EXISTENCE OF THE JURISDICTION BELOW

The Court of Appeals for the Second Circuit had jurisdiction over the Board's application for enforcement under Section 10(e) of the National Labor Relations Act, 29 U.S.C. Section 10(e).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS UPHOLDING THE ORDER OF THE NATIONAL LABOR RELATIONS BOARD REQUIRING PETITIONER TO BARGAIN WITH THE UNION IS INCONSISTENT WITH THE FEDERAL LABOR POLICY EMBODIED IN SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT AFFORDING EMPLOYEES THE RIGHT TO REFRAIN FROM UNION REPRESENTATION.

To best protect employee rights, national labor policy dictates that employees not have union representation forced upon them when, by exercise of their free will, they might have chosen otherwise. Section 7 of the National Labor Relations Act specifically grants employees the right to refrain from joining labor organizations. National Labor Relations Act Section 7, 29 U.S.C. Section 157.

The result of an enforcement of the National Labor Relations Board's bargaining order in this case is the requirement that Star Color bargain with Local 1. Such an outcome is plainly and manifestly unfair to the current employee complement and in total derogation of national labor policy. It is a *prima facie* violation of the rights of the current employees. Only two of the approximately twenty employees that would be forced to be represented by Local 1 in negotiations actually voted in the ancient election. It is also undeterminable whether those two individuals voted for or against the Union.

This bargaining order unnecessarily undermines the freedom of choice that Congress sought to guarantee the employees, and, thus, frustrates rather than effectuates the policies of the Act. In fashioning a remedy, therefore, the right of the employees freely to choose their bargaining representative must be of paramount importance. *See, NLRB v. Flomatic Corp.*, 347 F.2d 74, 78 (2d Cir. 1965). Bargaining orders are so inimical to free choice that the Second Circuit Court of Appeals itself remanded a case to the Board to reconsider whether the entry of a bargaining order was appropriate notwithstanding that a valid election had been held. *See, Glomac Plastics, Inc. v. NLRB*, 592 F.2d 94 (2d Cir. 1979). Therefore, it is the Second Circuit's own view that even under the rule of *Patent Trader*, 426 F.2d 791 (2d Cir. 1970) (en banc), a bargaining order should be scrutinized to determine its propriety. The First Circuit, too, will remand a case so that the Board may determine if a bargaining order should be entered on the basis of an ancient election. *See, NLRB v. H.P. Hood, Inc.*, 496 F.2d 575 (1st Cir. 1974). The conclusion is inescapable that the Court's order works an unlawful imposition upon the Company's current employees' Section 7 rights so zealously guarded by the Courts.

The Board does not contend that the Union actually has majority support today. Rather, the Board is relying upon a now seven-year old election in which only two of the present twenty employees voted. The policy of employee free choice in its purest form must override a stale election especially in view of the fact that the delay was caused solely by the Board's lethargic processes. The Board, which is supposed to facilitate the National Labor Relations Act's policy of encouraging collective bargaining by employees through representatives of their *own* choosing, has instead affirmatively trampled upon employee rights and has thrust upon the employees a union

not necessarily of choice. In effect, the Second Circuit Court of Appeals' decision undermines the election procedures which are designed to secure recognition based upon the choice of employees. Clearly, there is no basis whatever for supposing that the current employee complement desires Local 1 to act for them. *See, NLRB v. Staub Cleaners, Inc.*, 418 F.2d 1086, 1090 (2d Cir. 1969) (dissenting opinion).

It is time for the Supreme Court of the United States to put the Board on notice that Circuit Court of Appeals will not issue an order of enforcement in derogation of employee § 7 rights when it is apparent that the proposed order is inappropriate to the situation originally sought to be corrected. Vindication of employee rights coupled with a message to administrative agencies guilty of egregious delay should compel the Court to grant certiorari herein.

II.

THE SECOND CIRCUIT COURT OF APPEALS IMPROPERLY BALANCED THE COMPETING POLICIES OF EMPLOYEE FREE CHOICE WITH THE SETTING ASIDE OF AN ELECTION; THE BALANCING SHOULD BE SETTLED BY THE SUPREME COURT OF THE UNITED STATES AS AN ISSUE OF NATIONAL IMPORTANCE.

It is undisputed that the policy of the National Labor Relations Act is to encourage collective bargaining by employees through representatives of their own choosing. *NLRB (Fusco) v. Kaase Baking Co.*, 205 F. Supp. 465 (D.C. Ohio 1962). The Second Circuit Court of Appeals, however, chose to frustrate this policy by enforcing the Board's bargaining order. The Circuit Court concluded that fewer policies were frustrated by enforcement than by nonenforcement and, therefore, chose the former. (App. A-4)

The Court identified as the major competing policy the objective of not conducting a second election where an election has already been held. Citing *Patent Trader, supra,* the Circuit Court maintained that an employer would be given "an incentive to disregard its duty to bargain in the hope that over a period of time a union would lose its majority status." (App. A-5) This reliance on *Patent Trader* is misplaced.

In the case at bar, the Union's majority status was questionable long before the Company refused to bargain. Thus the Circuit Court was not dealing with the situation of allowing an employer to profit from its own refusal to bargain. The inordinate delay and related turnover occurred long before the Employer exercised its right to refuse to bargain.

Patent Trader should be applicable only to cases where the employer caused the delay because of an illegal refusal to bargain following a timely election which *thereafter* led to a loss of majority. It should not be extended to this case, where the employer merely exercised its statutory right to administrative review and due process, and the Board itself unnecessarily and egregiously caused the delay.

Moreover, the Second Circuit did not give proper weight to the factor that bargaining orders are a drastic remedy and therefore should be analyzed at the time they issue. *See, Glomac* and *Hood, supra.* The Circuit Court turned aside Star Color's alternative prayer to remand the case for the agency to consider the appropriateness of the bargaining order upon the present employee complement. Star Color did not suggest that the Board reconsider whether unusual circumstances existed so as to relieve the employer of the duty to bargain. Rather, Star Color asked that the Board be required to examine a possible new election as a procedure which would necessarily produce a better reflection of the desires of the current employees.

The Second Circuit's reliance upon *Brooks v. NLRB*, 348 U.S. 96 (1954), was also misplaced. The issue in *Brooks* was the duty of an employer toward a duly certified bargaining agent if, *shortly* after the election which resulted in the certification, the union has lost, without the employer's fault, a majority of the employees from its membership. *Brooks*, at 98. Any reliance on *Brooks* ignores the very essence of why *Star Color* is a case of national importance, namely, the issue of egregious administrative delay. The basic premise of *Brooks* that a union enjoys a one-year bargaining period rests upon the premise that the certification was timely, and that the election result applies to the employees then affected. The

reasoning employed in *Brooks* is inapposite to a union certified five years after an election which cannot claim to represent employees who never voted in the election.

The Court of Appeals admitted realizing that its decision "may impose a bargaining representative that is not wanted by a majority of employees and that this result is contrary to the Act." (App. A-8) Citing *Patent Trader* again, it then asserted that such a violation of coveted § 7 rights could be rectified by a requirement that the Board give actual notice to the current employees of their statutory right to petition for a decertification election. *See, Patent Trader*, at 793. It is submitted that this attempt at mitigation is not meaningful and does not cure the problem of the statutory intent of protecting employees' rights of free choice being overridden.

The statutory framework to petition for a decertification election is embodied in § 9 of the Act. *See*, 29 U.S.C. § 159(c) (1) (A) (ii). The Act allows an election petition to be filed by employees who assert that the current union is no longer desired by employees. However, § 9(c) (3) precludes elections where in the preceding twelve-month period a valid election was held. 29 U.S.C. § 159(c) (3). Even if the post-election period is not tolled by the delay, the *Brooks* insulation rule would also bar an election petition. Thus, the only possible mitigation afforded by decertification rights in this instance would be if those rights could be implemented immediately. Mere notification to the employees of a right they cannot timely exercise is an act of futility creating only the illusion of relief.

Finally, the Second Circuit's decision to enforce the bargaining order because ordering another election would send the parties back to the Board's glacial processes, is unsupportable in both law and equity. To deny employees their

§ 7 rights in this case constitutes nothing less than a surrender to administrative delay no matter how shocking, and in effect it amounts to a rewrite of the statute. Substantive rights should not be required to succumb to agency failures in procedure.

The Circuit Court expressed the fear that allowing a second election would run the risk of producing another round in the future of administrative delay. (App. A-8) But this is the very reason why the Court should have denied enforcement in the first instance. Certiorari should be granted to rectify this situation.

III.

THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT UPHOLDING THE ORDER OF THE NATIONAL LABOR RELATIONS BOARD IS INCONSISTENT WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT INASMUCH AS THE COURT FAILED TO REMAND THE CASE TO DETERMINE THE CURRENT APPROPRIATENESS OF THE BARGAINING ORDER.

The Second Circuit Court of Appeals failed to remand this case to the Board to consider and make specific findings as to the appropriateness of a bargaining order upon the current employee complement, despite the fact that the First Circuit has done so in cases involving employee turnover and passage of time. *See, NLRB v. H.P. Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974); *NLRB v. St. Regis Paper Co.*, 674 F.2d 104 (1st Cir. 1982). Indeed, the Second Circuit has also recognized this principle in a prior case, though it did not apply it here. *Glomac Plastics, Inc. v. NLRB*, 592 F.2d 94 (2d Cir. 1979).

In *Hood*, above, an election was held in October 1968. Five and one half years elapsed while the Board dealt with refusal to bargain charges based upon a conflict of interest question. Notwithstanding that the Court affirmed the Board's conclusion that the employer committed an unfair labor practice, and, furthermore, notwithstanding the fact that the Union never had an opportunity to exercise its post-certification bargaining rights, the First Circuit remanded the case for further consideration. The Court specifically remanded the case so that the Board could deal with the question of whether

a bargaining order should be entered on the basis of an election which was held approximately five and one half years ago. *Hood*, at 520.

Just as in *Star Color*, the lapse of time stemmed from the Board's egregious delay during the administrative process. Noting the equities involved, the First Circuit stated,

> Even though we have upheld the Board, we think that under the circumstances the Board should have the opportunity prior to outright enforcement of the bargaining order to consider whether entry of the order remains appropriate. While this means an additional lapse of time in these already hoary proceedings, we think fairness will be better served than by immediately locking the parties into a lengthy relationship on the basis of ancient events. (footnote omitted)
>
> *Hood*, at 520.

Thus the Court adhered to the philosophy of the Act that employees be represented by an agent of their choice. In a situation which fails to necessarily reflect the selection of a union by the employees affected, the First Circuit will remand a case in accordance with the intent of the Act.

Similarly, in *NLRB v. St. Regis Paper Co., supra*, a union was certified as the exclusive bargaining representative of a unit at a main garage. The Board later found that a maintenance garage constituted an accretion to the existing unit at the main garage. More than five years passed between the ALJ's "accretion" decision and the Court's review.

The bargaining order sought would have required the company to bargain with employees who were never in the Union. The Court noted that this would "require the

Company to bargain in a unit at which there is little or no basis for assuming the union today enjoys the support of any of the employees." *St. Regis*, at 109 (citations omitted).

This is especially true in the instant case where only two of the twenty current employees actually voted in the ancient election. The Act is best effectuated by considering a request for enforcement of a bargaining order in light of "present realities." *St. Regis*, at 109.

The Second Circuit's enforcement of a bargaining order where its current applicability is in doubt, and where it is in conflict with the decisions of the First Circuit, should compel this Court to grant certiorari herein.

CONCLUSIONS

For the reasons set forth above, the petition should be granted.

Dated: Carle Place, N.Y.
June 15, 1988

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 535 August Term, 1987
(Argued January 6, 1988 Decided March 30, 1988)

Docket No. 87-4122

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

STAR COLOR PLATE SERVICE, DIVISION OF EINHORN ENTERPRISES, INC.,

Respondent,

LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA,

Intervenor.

Before:
VAN GRAAFEILAND, WINTER and ALTIMARI,
Circuit Judges.

Petition for enforcement of a bargaining order. The employer contends that the bargaining order should not be enforced because more than five years elapsed between the election and the Board's certification decision.

Enforced.

MARTIN H. SCHER, Carle Place, New York,
for Respondent.

DAVID A. FLEISCHER, National Labor Relations Board, Washington, D.C.
(Rosemary M. Collyer, General Counsel,

John E. Higgins, Jr., Deputy General Counsel,
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National Labor Relations Board,
Washington, D.C., of counsel), *for Petitioner.*

MARK D. RISK, New York, New York
(Michael F. O'Toole, Steven M. Stimell,
Robinson, Silverman, Pearce, Aronsohn &
Berman, New York, New York, of counsel),
for Intervenor.

WINTER, *Circuit Judge:*

This petition raises the question of whether we should deny enforcement of a bargaining order because of an egregious delay between the election and the certification of the union by the National Labor Relations Board. Because more than five years have elapsed between the certification election and the Board's order certifying the union, only a few of the employees who voted in the election are still in the bargaining unit. Nevertheless, we conclude that even where the delay in question is due to the Board's dilatory approach to its statutory responsibilities[1], we must enforce the order.

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[1] This is not an isolated instance of delay. *See NLRB v. Synergy Gas Corp.*, No. 87-4131 (2d Cir. 1988), filed this day.

BACKGROUND

Respondent Star Color Plate Service, Division of Einhorn Enterprises, Inc. is a New York corporation engaged in lithographic production services. On August 29, 1980, Local One of the Amalgamated Lithographers of America filed a representation petition seeking to represent the lithographic production employees at Star Color's Jamaica, New York plant. A representation election was held on March 31, 1981. There were eleven uncontested votes, six in favor of Local One, five in favor of another union. Fifteen votes were challenged, fourteen by Local One and one by the Board.

On June 30, 1981, the Regional Director sustained Local One's challenges to seven votes, overruled one challenge,[2] and consolidated the remaining ballot challenges with unfair labor practice charges leveled by the union. On various dates between July 13, 1981 and January 18, 1982, a hearing was held before an administrative law judge ("ALJ"). On March 17, 1983, the ALJ sustained the challenges to the remaining seven ballots on the grounds that Star Color had deliberately "packed" the bargaining unit in order to dilute the union's strength in the election. Star Color filed timely exceptions with the Board. On April 28, 1986, more than five years after the election and almost three years after the ALJ's decision, the Board adopted the ALJ's recommendation and certified Local One as the bargaining representative. On May 20, 1986, Star Color moved the Board to reconsider and/or to reopen the record to show the high turnover among the employees in the bargaining unit. On June 19, 1986, the Board denied the motion as lacking in merit.

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[2] On review, the Board reinstated the challenge to this ballot.

Local One had originally requested that the company bargain with it in May 1986, but the company refused because of the motion for reconsideration. After the denial of the motion, Local One again requested that Star Color bargain. Star Color again refused. The Board issued a complaint alleging a refusal to bargain in violation of § 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), (5) (1982). On November 24, 1986, the Board granted summary judgment against Star Color. The Board specifically noted that passage of time and employee turnover did not create sufficiently "special" or "unusual" circumstances to require the Board either to reexamine its decision made in the representation proceeding or to relieve the company of its obligation to bargain with the union.

DISCUSSION

Star Color argues that the Board's order should not be enforced because the passage of time between the certification election and the high turnover of employees in the bargaining unit have cast doubt upon the majority status of Local One. According to Star Color, enforcing the order would undermine employee freedom of choice and thereby frustrate rather than effectuate the policies of the Act. We believe that frustration of the policies of the Act is an inevitable result of the egregious administrative delay in this case no matter how we rule. Because we conclude that fewer policies are frustrated by enforcement than by nonenforcement, we choose the former.

A union that has been certified by the Board as a bargaining representative after a representation election normally enjoys an irrebuttable presumption of majority status for one year following the certification, even if the union no longer enjoys majority support. *Brooks v. NLRB*, 348 U.S. 96, 104 (1954);

NLRB v. Accurate Web, Inc., 818 F.2d 273, 275 (2nd Cir. 1987) per curiam.) If the employer refuses to bargain with the certified union, the Board may extend the certification year so that it does not commence until the employer begins to bargain in good faith. *NLRB v. All Brand Printing Corp.*, 594 F.2d 926, 929 (2d Cir. 1979).

There are, however, "unusual circumstances" in which the irrebuttable presumption will not apply, for example, where a certified union has dissolved and no longer exists, *Public Serv. Elec. & Gas Co.*, 59 N.L.R.B. 325, 327 (1944), or where a collective bargaining agreement with a duration of less than one year has expired, *Ludlow Typograph Co.*, 108 N.L.R.B. 1463, 1465 (1954). Apparent loss of majority status and delay in certification do not normally constitute "unusual circumstances." In *NLRB v. Patent Trader, Inc.*, 426 F.2d 791 (2d Cir. 1970) (in banc), there was both passage of time and "repudiation" of the union by a majority of the employees. Nevertheless, a unanimous in banc court held that "it is error to refuse to enforce a bargaining order when it is conceded that there has been a Board election, the Union was duly certified, and the Company thereafter refused to bargain in good faith." *Id.* at 792. We reached this conclusion because "[r]equiring still another Board election in such a situation undermines the central purpose of the National Labor Relations Act, since it gives an employer an incentive to disregard its duty to bargain in the hope that over a period of time a union will lose its majority status." *Id.*

In *Glomac Plastics, Inc. v. NLRB*, 592 F.2d 94 (2d Cir. 1979), almost six years had passed since the original certification, and four and one-half of those years were attributable to the Boards' delay. *Id.* at 101. Glomac made the argument now advanced by Star Color that the bargaining order should not

be enforced because enforcement would deny the employees the right freely to choose their own representative. *Id.* While we found this argument to have "considerable appeal" "[a]t first blush," we rejected it in favor of the rule and rationale of *Patent Trader*. *Id.* at 101-102. Nevertheless, to be "fair to all concerned" we withheld enforcement of the bargaining order for sixty days and remanded to the Board to give it a chance to reconsider its ruling. On remand, the Board accepted as accurate the company's "principal claims of substantial employee turnover in the unit and/or abandonment of the unit by the Union." *Glomac Plastics, Inc. v. NLRB*, 600 F.2d 3, 4 (2d Cir. 1979). Nevertheless, the Board reaffirmed its bargaining order, and we enforced. *Id.*

We find Star Color's efforts to distinguish *Patent Trader* unconvincing. Several cases cited by the company are inapposite because they involved bargaining orders issued where there had never been a representation election, *see, e.g., NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108, 110 (2d Cir. 1984); *NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2d Cir. 1983), or the Union had lost the election, *NLRB v. Knogo Corp.*, 727 F.2d 55, 58 (2d Cir. 1984).

Only two cases have come to our attention in which passage of time and possible employee turnover justified a refusal to enforce a bargaining order within a post-election certification year. *NLRB v. Connecticut Foundry Co.*, 688 F.2d 871 (2d Cir. 1982) and *NLRB v. Nixon Gear, Inc.*, 649 F.2d 906 (2d Cir. 1981). In both, however, we refused to enforce the bargaining order because the Board had abused its discretion when it failed to hold hearings on prima facie valid post-election challenges by the employers, which, if upheld, would have required the setting aside of the representation elections.

Connecticut Foundry, 688 F.2d at 876-77, *Nixon Gear*, 649 F.2d at 912. Passage of time and employee turnover were relevant in those cases because our only options were remanding to the Board and thus extending the delay or outright denial of enforcement. We did not have, as we have here, the option of enforcing the bargaining order. Moreover, delay and turnover supported denial in *Connecticut Foundry* and *Nixon Gear* because fading memories and unavailable witnesses might preclude the possibility of a fair hearing and a reliable determination of the challenges to the election. *Connecticut Foundry*, 688 F.2d at 881; *Nixon Gear*, 649 F.2d at 914.

As a fallback position, Star Color argues that even if this case is controlled by *Patent Trader*, we should follow the procedure in *Glomac Plastics* and remand to the Board for further consideration rather than enforce the order. We decline to do so. It is clear that the Board has already considered and rejected Star Color's argument that changed circumstances on account of passage of time and employee turnover constituted "unusual circumstances" relieving it of the duty to bargain in good faith during the certification year. Thus, a remand would be an "idle and useless formality," *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion), further increasing the already egregious delay in this case.[3] Indeed, we believe it now clear that the

[3] We reject the company's attempts to raise for the first time in its reply brief the question of whether the Board erred by refusing to count certain ballots cast in the representation election. While this issue was raised in the original representation proceeding, it was not raised in the unfair labor practice proceeding. Appellate review of this issue is therefore barred under § 10(e) of the Act, 29 U.S.C. § 160(e) (1982). Furthermore, the company's subsequent failure to present this claim in its original brief before this court provides an independent ground under Fed. R. App. P. 28(a)(2) for our refusal to hear this claim. *See Amoco Overseas Oil v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 653 n.3 (2d Cir. 1979).

Board will never view its own predictable delay as "unusual circumstances" calling for a new election.

We realize that our decision may impose a bargaining representative that is not wanted by a majority of employees and that this result is contrary to the policies of the Act. This result can be mitigated by the Board's giving actual notice to the current employees of their statutory right to petition for a decertification election. *Patent Trader*, 426 F.2d at 793. Our enforcement order will become effective when such notice is given. Were we to deny enforcement and order another election, we would merely be sending the parties back to the Board's glacial processes with no assurance that years from now a certification based on a second election that will not be challenged on exactly the same grounds. That result would similarly undermine policies of the Act. We therefore follow *Patent Trader* in the hope that enforcement will marginally reduce the incentive of employers to take advantage of the Board's inexcusably slow processes.

Enforced.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

STAR COLOR PLATE SERVICE,
DIVISION OF EINHORN ENTERPRISES, INC.,

Respondent,

and

LOCAL ONE, AMALGAMATED
LITHOGRAPHERS OF AMERICA,

Intervenor.

No. 87-4122

United States Court of Appeals
Second Circuit
FILED
APR 26, 1988
Elaine B. Goldsmith, Clerk

JUDGMENT

Before: VAN GRAAFEILAND, WINTER and ALTIMARI, *Circuit Judges*

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Star Color Plate Service, Division of Einhorn Enterprises, Inc., Jamaica, New York, its officers, agents, successors, and assigns on 24 November 1986. The Court heard argument of respective counsel on 6 January 1988, and has considered the briefs and

transcript of record filed in this cause. On 30 March 1988, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Star Color Plate Service, Division of Einhorn Enterprises, Inc., Jamaica, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with Local 1, Amalgamated Lithographers of America, International Typographical Union, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All lithographic production employees employed by the Employer at its facility located on Jamaica

Ave., Jamaica, New York, excluding drivers, messengers, clerical employees, guards, and supervisors within the meaning of the Act.

(b) Post at its facility in Jamaica, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29 of the National Labor Relations Board (Brooklyn, New York), after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within 20 days from the date of this Judgment what steps the Respondent has taken to comply.

Each party shall bear its own costs.

RALPH K. WINTER
Judge, United States Court of
Appeals for the Second Circuit

FRANK X. ALTIMARI
Judge, United States Court of
Appeals for the Second Circuit

FILED: April 26, 1988

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT,
ENFORCING AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 1, Amalgamated Lithographers of America, International Typographical Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All lithographic production employees employed by the Employer at its facility located on Jamaica Ave., Jamaica, New York, excluding drivers, messengers, clerical employees, guards, and supervisors within the meaning of the Act.

Employees, pursuant to § 9(c) (1) of the National Labor Relations Act, may petition the National Labor Relations Board for an election to decertify and remove the Union as their bargaining representative. The filing of such a petition can only be done as the voluntary act and choice of the employees and on their own initiative, without coercion, encouragement or assistance from management. All applicable rules, regulations and standards for conducting such an election must be met.

STAR COLOR PLATE SERVICE,
DIVISION OF EINHORN ENTERPRISES, INC.

_____

(Employer)

Dated _____

By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, Brooklyn, New York 11241, Telephone 718-656-2862.

282 NLRB No. 31

DJS
D-4133
Jamaica, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

STAR COLOR PLATE SERVICE, DIVISION OF EINHORN ENTERPRISES, INC.

and

LOCAL 1, AMALGAMATED LITHOGRAPHERS OF AMERICA, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO

Case 29-CA-12416

DECISION AND ORDER

Upon a charge filed by the Union 13 May 1986, the General Counsel of the National Labor Relations Board issued a complaint 24 June 1986 against the Company, the Respondent, alleging that it has violated Section 8(a) (5) and (1) of the National Labor Relations Act.

The complaint alleges that on 28 April 1986, following a Board election in Case 29-RC-5121, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's rules and regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed. Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).)

The complaint further alleges that since 14 May 1986, the Company has refused to bargain with the Union. The complaint also alleges that since 14 May 1986, the Company has failed and refused to furnish the Union with information requested by it necessary and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the unit. On 8 July 1986, the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 2 September 1986 the General Counsel filed a Motion for Partial Summary Judgment and Issuance of Decision and Order, and on 18 September 1986 the General Counsel filed an amendment to its motion.[1] On 19 September 1986 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Partial Summary Judgment

The Company's answer denies that it has refused to bargain with the Union. The Company admits, however, that by letter dated 24 June 1986 the Union requested to begin negotiations, and that it sent a letter to the Union dated 30 June 1986 stating that it would not commence negotiations with the Union until the Company's position with respect to representation was litigated. The Company denies that it

[1] The General Counsel, in that amendment, deleted any argument that summary judgment should be granted with respect to the allegation that the Company refused to furnish information. Thus the General Counsel's motion is limited to the allegation that the Respondent refused to bargain.

acted unlawfully and asserts an affirmative defense that the complaint fails to state a valid 8(a)(5) and (1) violation of the Act, because it is based on an unlawful Decision, Order, and Certification of Representative by the Board. The General Counsel argues that all material issues have been previously decided. We agree with the General Counsel.

The record, including the record in Case 29-RC-5121, reveals that pursuant to a Decision and Direction of Election issued by the Regional Director, an election was conducted on 31 March 1981. The tally of ballots shows that 6 votes were cast for the Union, Local 1, 5 votes were cast for the Intervenor, no votes were cast against the participating labor organizations, and 15 votes were challenged.[2] In addition, the Union on 7 April 1981 filed timely objections to the conduct of the election.

On 30 June 1981 the Regional Director issued a supplemental decision, order consolidating cases, and notice of hearing in Cases 29—RC—5121, 29—CA—8280, 29—CA—8407, 29—CA—8796, and 29—CA-8811—2, in which he directed that a hearing be conducted on the challenges to the ballots of six voters, that the challenge to one voter be

[2] The ballots of four voters were challenged on the basis that they were not employees of the Employer, two voters on the basis that they were irregular part-time employees, four voters on the basis that they were not part of the voting unit, and four voters on the basis that they were supervisors within the meaning of the Act. The Board agent challenged the remaining voter whose name did not appear on the voting eligibility list.

deferred pending the disposition of Case 29—CA—8407, that the challenges to the ballots of seven voters be sustained, and that the challenge to the ballot of one voter be overruled. The Regional Director further ordered that Cases 29—CA—8280, 29—CA—8407, 29—CA—8796, 29—CA—8811—2, and 29—RC—5121 be consolidated for the purpose of hearing, ruling, and a decision by an administrative law judge, and that thereafter Case 29—RC—5121 be transferred and continued before the Board in Washington, D.C. Pursuant to a request for review filed by the Union of the Regional Director's supplemental decision, order consolidating cases, and notice of hearing, the Board on 31 August 1981, denied the request for review, except that the Board concluded that one challenge to the ballot sustained by the Regional Director be consolidated with the other challenges and objections set for hearing.

On various dates between 13 July 1981 and 18 January 1982, a consolidated hearing was conducted before a duly designated administrative law judge on the issues raised in Case 29—RC—5121, and on the issues raised by the complaints and notices of hearing in Cases 29—CA—8280, 29—CA—8407, 29—CA—8796, and 29—CA—8811—2, as amended by the Board on 31 August 1981.

On 17 March 1983 the decision of the administrative law judge issued in which he recommended to the Board that the remaining challenges be sustained. On 28 April 1986 the Board issued its Decision, Order, and Certification of Representative[3] in which it certified the Union as the exclusive bargaining representative in the appropriate unit.

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[3] *279 NLRB No. 82 (Apr. 28, 1986).*

On 20 May 1986 the Company filed with the Board a motion for reconsideration and/or to reopen the record and for a stay of enforcement of the Board's decision in 279 NLRB No. 82 (Apr. 28, 1986), on the grounds that it would be unfair to enforce a bargaining order with regard to a unit in which the election had been held over 5 years previously and where there had been significant employee turnover because the Union might not currently have the support of a majority of the unit employees. The Respondent moved to reopen the record in order to present further information regarding four employees and the sustained challenges to their ballots, and the remedial obligation regarding one employee discriminatee who is allegedly no longer employed by the Company. The Board issued an Order on 18 June 1986 denying the Company's motion.[4]

In its response to the General Counsel's Motion for Partial Summary Judgment, the Company reiterates its contention that it can legitimately refuse to bargain based on the 5-year hiatus between the representation election and certification in light of the significant employee turnover.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of § 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

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[4] The Board noted that Respondent may raise the issue of the remedial obligation to the one employee discriminatee at the compliance stage of that proceeding. That issue is not involved herein.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding.[5] Accordingly we grant the Motion for Partial Summary Judgment.

SUMMARY JUDGMENT

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Company, a New York State corporation, is engaged

[5] The cases cited by the Respondent in which the United States Court of Appeals for the Second Circuit refused to uphold bargaining orders issued by the Board are distinguishable. In *NLRB v. J. Coty Messenger Service*, 763 F.2d 92, 101-102 (2d Cir. 1985), and *NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230-232 (2d Cir. 1983), the Board had issued bargaining orders after reaching determinations that fair elections could not be held. The Second Circuit refused to enforce these orders, based on the passage of time and employee turnover, and because the clearly preferred method for determining a majority representative is an election. In the instant case, the Union was certified by the Board as the exclusive representative since the Union won the majority of the valid ballots cast in a fair election. It is well settled that the initial 1-year period of certification begins the date the respondent begins to bargain in good faith with the union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965). In addition, the Board concludes that the circumstances presented by the Respondent in its opposition to the General Counsel's Motion for Partial Summary Judgment do not constitute "unusual circumstances" within the meaning of *Ray Brooks v. NLRB*, 348 U.S. 96 (1954), which would relieve it of the obligation to bargain with the Union.

in the manufacture, nonretail sale, and distribution of lithographic plates, film, and related products, at its facility in Jamaica, New York, where it annually purchases and receives at its facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of New York. We find that the Company is an employer engaged in commerce within the meaning of § 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of § 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Certification*

Following the election held 31 March 1981 the Union was certified as the collective-bargaining representative of the employees in the following appropriate unit:

> All lithographic production employees employed by the Employer at its facility located on Jamaica Ave., Jamaica, New York, excluding drivers, messengers, clerical employees, guards, and supervisors within the meaning of the Act.

The Union continues to be the exclusive representative under § 9(a) of the Act.

B. *Refusal to Bargain*

Since 6 May 1986 the Union has requested the Company to bargain, and since 30 June 1986 the Company has refused.[6] We find that this refusal constitutes an unlawful refusal to bargain in violation of § 8(a) (5) and (1) of the Act.

Conclusions of Law

By refusing on and after 30 June 1986 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of § 8(a) (5) and (1) and § 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated § 8(a) (5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good

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[6] The complaint alleges that the Respondent has refused to bargain with the Union since on or about 14 May 1986. However, by letter dated 14 May 1986, the Respondent notified the Union it declined to commence negotiations because it had decided to file a motion for reconsideration with the Board. On 18 June 1986 the Board denied the Respondent's motion. Subsequently, the Union again requested negotiations with Respondent by letter dated 24 June 1986. Respondent's letter dated 30 June 1986 advised the Union that it would not commence negotiations. Without deciding whether Respondent's 14 May 1986 letter constituted an unlawful refusal to bargain, we find that the 30 June 1986 letter clearly constituted such a refusal.

faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Star Color Plate Service, Division of Einhorn Enterprises, Inc., Jamaica, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 1, Amalgamated Lithographers of America, International Typographical Union, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by § 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All lithographic production employees employed by the Employer at its facility located on Jamaica Ave., Jamaica, New York, excluding drivers, messengers, clerical employees, guards, and supervisors within the meaning of the Act.

(b) Post at its facility in Jamaica, New York, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days

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[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 24 November 1986

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

James M. Stephens, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 1, Amalgamated Lithographers of America, International Typographical Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by § 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All lithographic production employees employed by the Employer at its facility located on Jamaica Ave., Jamaica, New York, excluding drivers,

messengers, clerical employees, guards, and supervisors within the meaning of the Act.

STAR COLOR PLATE SERVICE, DIVISION
OF EINHORN ENTERPRISES, INC.

_____
(Employer)

Dated By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, Brooklyn, New York 11241, Telephone 718-656-2862.

(2)

No. 87-2126

Supreme Court, U
FILED
JUL 29 1988
JOSEPH F. SPANIOL
CLERK

IN THE

Supreme Court of the United S

October Term, 1988

STAR COLOR PLATE SERVICE,
DIVISION OF EINHORN ENTERPRISES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF LOCAL ONE, AMALGAMATED LITHOGRAPHERS OF AMERICA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES F. GILL
ROBINSON, SILVERMAN, PEARCE,
ARONSOHN & BERMAN
Attorneys for Local One,
Amalgamated Lithographers
of America
230 Park Avenue
New York, New York 10169
(212) 687-0400

QUESTION PRESENTED

Did the Court of Appeals err by ruling that an employer must bargain with a union that has been certified as bargaining representative after winning an election notwithstanding a delay between the election and the certification, where that delay is the result of protracted litigation occasioned by the employer's numerous unfair labor practices, attempt to pack the bargaining unit with new anti-union employees, and instigation of non-employees, supervisors and other persons clearly not within the bargaining unit to vote?

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STATEMENT OF THE CASE

Intervenor, Local One, Amalgamated Lithographers of America (the "Union") submits this Brief in opposition to the Petition by Star Color Plate Service (the "Employer") for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit issued on March 30, 1988, which decision enforced the prior order of the National Labor Relations Board (the "Board") dated November 24, 1986.

Eight years ago, on August 29, 1980, the Union filed a representation petition with the Board, in which it sought to represent the lithographic production employees at the Employer's Jamaica, New York factory. The Union won a majority of the votes cast at the March 31, 1981 representation election conducted by the Board. The Employer's position is that although the Union's victory in the election has withstood seven years of litigation, that victory should be treated as a nullity *because* seven years of litigation have been required to uphold it. The Court of Appeals rejected this cynical argument and this Court should not dignify it with a hearing.

First, even before the election was held, the Employer opposed the lithographic production bargaining unit for which the Union petitioned arguing, *inter alia,* that four owners of the Employer, as well as truck drivers, one messenger and a clerical employee should be entitled to vote. After a hearing, the Board specifically rejected these claims, and directed a representation election which was conducted on March 31, 1981.[1]

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1. The Employer committed numerous unfair labor practices during the organizing campaign, including layoffs of union supporters, discriminatory work assignments and disciplinary practices, withdrawal of privileges, and denials of training to Union supporters. The Administrative Law Judge later found that the Employer had committed numerous violations of the National Labor Relations Act (the "Act"), which finding was upheld by the Board.

There were about eleven lithographic production employees who were eligible to vote in the election. On the day of the election, however, the Employer enlisted fourteen additional persons—four non-employees, four of its supervisors, two irregular part-time employees, and four employees not in the bargaining unit to attempt to vote in a transparent effort to prevent a legitimate, fair election from taking place. Seven of the fourteen had already been specifically ruled outside the unit by the Regional Director following the pre-election hearing. These seven included the four owners of the Employer, who proceeded to vote in the election in spite of the clear prior ruling that they were not entitled to do so!

The tally of the eleven unchallenged ballots showed that a 6-5 majority had been cast in favor of the Union.[2]

The Union challenged the ballots of the fourteen other persons put forward by the Employer. The Union could not permit the challenged ballots to be opened since the people who cast them had been presented by the Employer and their ballots almost certainly were cast against the Union. On June 30, 1981, the Regional Director sustained the Union's challenges to the ballots of the seven employees whom he had previously ruled were outside the unit and directed an administrative hearing for the seven other challenges. The ballot challenges were consolidated for hearing with the numerous charges of unfair labor practices filed by the Union against the Employer as a result of its unlawful pre-election activities. After a thirteen day hear-

2. Five votes were cast for Local 363, International Brotherhood of Teamsters and no votes were cast for no union.

ing on all of the unfair labor practice charges and the ballot challenges, the Administrative Law Judge issued his opinion on March 17, 1983 ("ALJ Opinion"), finding not only that the Employer had committed numerous acts of unlawful discrimination against Union supporters during the organizing campaign, but more importantly, sustaining the Union's challenges to the remaining seven ballots on the grounds that the Employer had deliberately packed the bargaining unit with anti-Union employees in order to dilute the Union's strength in the election. The decision stated that

> . . . the entire system of operations at [Employer's] plant drastically changed subsequent to the initiation of the representation petition of Petitioner. The Employer sought every means at its disposal to deprive its unit employees of representation by Petitioner. The hiring of the six part-time employees in October and November, 1980, as well as the hiring of Frayne, a former employee, was effectuated by Star Color to "pack the unit" in order to insure that Petitioner would not be successful in its organizational efforts. . . .

ALJ Opinion at 46. As for the ballots cast by the Employer's four owners, the ALJ Opinion states:

> I cannot find any justification for Respondent's position in having the four supervisors . . . presenting themselves at the polls to vote after the Regional Director had decided . . . that these four were owners and supervisors. . . . the only explanation I can conceive of for this action by Respondent is to hinder and frustrate at every opportunity the wishes of its unit employees.

ALJ Opinion at 44-45 (Emphasis supplied). The Employer filed extensive exceptions to the ALJ Opinion with the Board. An April 28, 1986, the Board denied all of the Em-

ployer's exceptions, including those concerning the extra ballots, and certified the Union as bargaining representative. 279 NLRB No. 82.

The Employer, however, had not yet exhausted its delaying tactics. When the Union requested collective bargaining negotiations, the Employer refused. Instead, the Employer filed a motion on May 20, 1986 for reconsideration of the Board's decision and for leave to reopen the record for the insertion of additional evidence on the challenged ballots. On June 18, 1986, the Board denied the Employer's motion. Upon an unfair labor practice charge filed by the Union, the Board issued a complaint on June 24, 1986 alleging that the Employer had unlawfully refused to bargain with the Union in violation of Sections 8(a)(1) and (5) of the Act. On November 24, 1986 the Board granted summary judgment on the complaint and ordered the Employer to commence bargaining. 282 NLRB No. 31. (App. at C-1).[3]

When the Employer continued to refuse to bargain, the Board sought enforcement of its Order at the Second Circuit. The Employer argued before the Court of Appeals that the lengthy delay between the election and the issuance of the bargaining order made that bargaining order an inappropri e remedy, and that alternatively the Court should have remanded the case to the Board for a determination of the question of whether the passage of time rendered the bargaining order inappropriate. The Court rejected these claims and enforced the Board's Order. *NLRB* v. *Star Color Plate Service*, 843 F.2d 1507. (App. at A-1).

3. References denoted "App." are to the Appendix to the Petition for Certiorari submitted to this Court by the Employer.

ARGUMENT

I. PETITIONER HAS FAILED TO ASSERT GROUNDS SUFFICIENT TO WARRANT THE GRANT OF CERTIORARI.

Based on this Court's requirements for the granting of a writ of certiorari, the Employer has woefully failed to set forth grounds for the Court to take up this case.

The Court should exercise its discretion to grant review of a decision of a court of appeals on writ of certiorari "only when there are special and important reasons therefor." S.Ct.R. 17.1. The writ of certiorari is proper where the case raises an important question of federal law which has not been, but should be, settled by the Supreme Court. *Nixon* v. *Fitzgerald,* 457 U.S. 731 (1982); *Couch* v. *United States,* 409 U.S. 322 (1973); *Tidewater Oil Co.* v. *United States,* 409 U.S. 151 (1972).

Supreme Court review may also be appropriate when a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same issue. *See National Association of Greeting Card Publishers* v. *United States Postal Service,* 462 U.S. 810 (1983); *NLRB* v. *Savair Manufacturing Co.,* 414 U.S. 270 (1973); *Sinclair Refining Company* v. *Atkinson,* 370 U.S. 195 (1962). Minor inconsistencies among the circuits, however, do not warrant review on certiorari. Certiorari should be granted only when the case involves principles the settlement of which are important to the public, and where there is a "real and embarrassing conflict" between the courts of appeals.

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it

> may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

Rice v. *Sioux City Memorial Parks Cemetery,* 349 U.S. 70 (1950) (writ of certiorari dismissed as improvidently granted) (citations omitted).

As will be set forth in greater detail *infra,* the Employer has utterly failed to allege any grounds remotely sufficient to warrant issuance of a writ of certiorari. The issues of law raised by the Employer have been settled long ago by this Court and the courts of appeals, and the supposed conflict between circuit courts asserted by the Employer is nonexistent in this case.

Accordingly, the Court should deny the petition for certiorari.

II. THE PETITION RAISES NO ISSUES WHICH HAVE NOT BEEN CLEARLY RESOLVED BY THE FEDERAL COURTS.

The Employer argues that the passage of time between the Union's victory in the election and the Board's certification of the Union as bargaining representative renders the bargaining order an inappropriate remedy, since there was significant turnover in the employee complement during that period. The Employer contends that issunace of an order requiring the Employer to bargain with the Union would frustrate the policies of the Act in view of the fact that most of the employees currently in the bargaining unit were not employed by the Employer at the time of the elec-

tion. Review of relevant cases makes clear that neither this Court nor the circuit courts share the Employer's view of the Act, and that the Employer's claim is plainly without merit.

This Court has made the law quite clear concerning the extent of the Employer's duty to bargain with a union which has been certified by the Board following a representation election. In *Brooks* v. *NLRB*, 348 U.S. 96 (1954) the Court held that such a union has an irrebuttable presumption of majority status for a one year period following the date of certification regardless of whether it has maintained majority status. This Court has continued to rely on *Brooks* and to cite it with approval. *See, e.g., NLRB* v. *Financial Institution Employees*, 475 U.S. 192, 197, 208 (1986), *NLRB* v. *Burns International Security Services, et al.*, 406 U.S. 272, 279 n.3 (1972); *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 599 n.14 (1969).

The Board has routinely with this Court's approval extended the certification year as the remedy for an 8(a)(5) violation. *Franks Brothers Co.* v. *NLRB*, 321 U.S. 702 (1944); *NLRB* v. *Accurate Web, Inc.*, 818 F. 2d 273, 275 (2d Cir. 1987); *Glomac Plastics, Inc.* v. *NLRB*, 592 F.2d 100, 101 (2d Cir. 1979). Typically, in extending the certification year, the Board orders that the year will commence when good faith bargaining begins. *Mar Jac Poultry Co.*, 136 NLRB 785 (1962); *NLRB* v. *Lee Office Building*, 572 F.2d 704, 707 (9th Cir. 1978). After the certification year, the presumption of a union's majority status is rebuttable, and only then may an employer refuse to bargain with the union based on a good faith doubt of the union's continued majority status.

In the present case, there has been no bargaining between the Employer and the Union at any time. Accordingly, the Board's bargaining order extended the certification year, and directed that it begin to run following the commencement of bargaining. (App. at C-8, 9). Thus, *assuming arguendo* that the Union has in fact lost its majority status, the Employer may not refuse to bargain based on the good faith doubt doctrine for one full year after the commencement of bargaining.

The Employer appears to acknowledge these basic principles of labor law, but argues that "special circumstances" prevent their application to this case. The Employer claims that the six year delay prior to certification and the high turnover among bargaining unit employees excuse it from normal bargaining obligations during the certification year.[4]

Both the Ninth and Second Circuit courts have specifically rejected the Employer's argument prior to its rejection by the Second Circuit in this case. In *NLRB* v. *Best Products Co., Inc.*, 765 F.2d 903 (9th Cir. 1985), an employer claimed that a bargaining order should not be enforced due to high employee turnover and a time delay of about two years between the election and the certification. As in the

4. While the Board and reviewing courts have recognized unusual circumstances sufficient to permit an Employer to withdraw recognition during the certification year, such cases have been limited to two types: (a) a schism within or dissolution of the certified union, and (b) radical fluctuation in the size of the bargaining unit within a short period of time. The Board and reviewing courts have continued to construe this exception narrowly. *See, e.g. Airport-Shuttle Cincinnati Inc.*, 257 NLRB 955 (1981) (Union's "total inactivity" following its certification coupled with a "disaffection petition" signed by 70% of bargaining unit employees is *not* unusual circumstances).

instant case, the Board included in the bargaining order an extension of the certification year so that it would begin to run on the date of the first bargaining session. In rejecting the Employer's claim of special circumstances, the Ninth Circuit Court of Appeals stated that:

> the certification year has not yet begun to run here, since the Board ordered that the period of certification would begin on the date that Best commences good faith bargaining . . . It is thus immaterial whether there has been great employee turnover or a significant lapse of time since the election. The beginning of the irrebuttable presumption may properly run from the date of [the bargaining order] until one year after Best complies with the Board bargaining order's command to negotiate in good faith.

765 F.2d at 914.

In *NLRB* v. *Patent Trader*, 426 F.2d 791 (2d Cir. 1970), the Court of Appeals for the Second Circuit, sitting *en banc*, rejected an employer's argument that time delays between the certification and the Board's finding of an unlawful refusal to bargain by the employer required that a new election rather than an order directing bargaining was the appropriate remedy. The Court stated that "[t]he basic point is that it is an error to refuse to enforce a bargaining order when it is conceded that there has been a Board election, the Union was duly certified, and the Company thereafter refused to bargain in good faith." *Id.* at 792. The Court noted that a Board-supervised election had already been held, and that, "[t]he choice here is not between a bargaining order or an election in the first instance, but between requiring two Board elections rather than just the

one already held." *Id.* The Second Circuit has continued to follow the *Patent Trader* analysis and to cite with approval to its ruling. *See Glomac Plastics, Inc.* v. *NLRB*, 592 F.2d 100 (2d Cir. 1979); *NLRB* v. *All Brand Printing Corp.*, 594 F.2d 926 (2d Cir. 1979); *NLRB* v. *Windsor Industries, Inc.*, 730 F.2d 860, 865, n.1 (2d Cir. 1984).

The Employer has cited no case in which a court accepted its argument that the passage of time makes a bargaining order an inappropriate remedy for a refusal to bargain. Nor does any such case exist. Indeed, the Employer's argument was essentially disposed of by this Court's holding in *Brooks* in 1954. Acceptance of the Employer's logic would stand the Act on its head. As the Second Circuit has noted in this case, if the passage of time provided a basis for an employer to refuse to bargain following a certification, then employers would be encouraged to engage in unlawful conduct so that litigation of that conduct before the Board might result in the requisite delay. Excusing an employer's bargaining obligations due to delay caused by litigation of employer unfair labor practices would reward the employer for committing those unfair labor practices, a comical result antithetical to the basic policies of the Act. Indeed, the record in this case makes it clear that *this* Employer is singularly undeserving of such a windfall, as it had no reservations about committing brazen and numerous unfair labor practices to disrupt the election and to forestall its bargaining obligation. *See supra* at 1-4. What an injustice it would be if the Court excused this Employer's bargaining obligation!

III. PETITIONER HAS ALLEGED NO SIGNIFICANT CONFLICT BETWEEN THE COURTS OF APPEALS.

The Employer also suggests that the Court of Appeals should have remanded this matter to the Board for a determination of whether the passage of time rendered a bargaining order inappropriate. The Employer now claims to this Court that the First Circuit would have so remanded this case, and that accordingly a conflict exists between the First Circuit and the Second and Ninth Circuits that requires this Court's intervention. Closer examination of the relevant cases and the record in this case reveals that no such conflict exists.

Moreover, minor inconsistencies between circuit courts do not provide a basis for granting the writ of certiorari. A conflict between circuits must be "real and embarrassing" to warrant redress by the Court. *Rice* v. *Sioux City Memorial Parks Cemetery, supra.* Even if the purported conflict did exist its magnitude and significance would be well short of the required standard.

In *NLRB* v. *H.P. Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974), and *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104 (1st Cir. 1982), the court enforced the Board's bargaining orders but remanded to the Board to determine whether the passage of time rendered a bargaining order inappropriate.[5]

5. In *Hood,* the Court ruled that a union was not disqualified from representing employees of a milk distributor because of an alleged conflict of interest arising from loans to a competing milk distributor by a pension fund affiliated with the union. The Court withheld entry of judgment for sixty days so that the Board could consider whether the order "remains appropriate." In *St. Regis Paper,* the Employer had moved the location of its facility after the Board issued the bargaining order and prior to the Court's ruling. The Court enforced the Board's order and remanded the case to the Board to consider whether the bargaining order remained appropriate.

If the First Circuit's election to remand those cases following its enforcement of the Board's orders might ever raise a conflict between circuit courts sufficient to warrant this Court's review on certiorari, it plainly does not do so in this case. The First Circuit cases are readily distinguishable from this case. In this case the Board had *already* expressly addressed and rejected the Employer's claim that the passage of time made a bargaining order inappropriate. The Board did so in its Order of November 24, 1986 (App. at C-6)—the very Order on which it sought the Court's enforcement! Indeed, the *only* proceeding subsequent to this determination by the Board was the appeal to the Court of Appeals. Accordingly, the Court of Appeals noted that remand to the Board for a ruling on a question on which it had just ruled in this case would be an "idle and useless formality" *citing NLRB* v. *Wyman-Gordon, Co.* 394 U.S. 759, 766 n.6 (1969). In the First Circuit cases cited by the Employer, the Board had not yet addressed the issue remanded to it. Thus, the instant case does not present the question presented in *Hood* and *St. Regis,* and the Court of Appeals' ruling here creates no conflict with those decisions. Accordingly, no basis for issuance of the writ of certiorari exists.

CONCLUSION

Based on the foregoing, the Union respectfully requests that the Court deny the petition for a writ of certiorari in its entirety.

Dated: New York, New York
July 25, 1988

Respectfully Submitted,

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No. 87-2126

In the Supreme Court of the United States

OCTOBER TERM, 1988

STAR COLOR PLATE SERVICE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board acted within its discretion in ordering petitioner to bargain with the certified representative of its employees, notwithstanding the passage of time and employee turnover between the election and the Board's certification of the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 843 F.2d 1507. The decision and order of the National Labor Relations Board (Pet. App. C1-C11) is reported at 282 N.L.R.B. No. 31. The Board's decision and order in the underlying representation proceeding is reported at 279 N.L.R.B. 576.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B5) was entered on April 26, 1988. The petition for a writ of certiorari was filed on June 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1980, Local One, Amalgamated Lithographers of America ("Local One") filed a petition for a representation election in a bargaining unit consisting of the lithographic production employees at the Jamaica, New York, plant of petitioner Star Color Plate Service. Local 363 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 363") intervened. In the representation election, conducted on March 31, 1981, there were eleven uncontested ballots: six votes were cast for Local One, five votes were cast for Local 363. Pet. App. C3; 279 N.L.R.B at 592-597. Fifteen ballots were challenged: fourteen by Local One and one by the Board (*ibid.*). Local One also filed objections to the conduct of the election (*ibid.*).

After an administrative investigation, the Board's Regional Director issued a supplemental decision in which he sustained Local One's challenge to seven ballots,[1] overruled its challenge to one ballot, and ordered that a hearing be held to resolve the remaining challenges and most of Local One's election objections. The Regional Director ordered that the matter be consolidated for hearing with pending unfair labor practice complaints against petitioner involving essentially the same allegations as the election objections. Pet. App. C3-C4.[2]

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[1] The Regional Director noted that he had already found in the Decision and Direction of Election issued on March 5, 1981, that these seven voters, four supervisors within the meaning of the Act and three non-members of the unit found appropriate, were not entitled to vote. Supplemental Decision and Order, Case No. 29-RC-5121, at 12.

[2] On Local One's appeal, the Board concluded that the challenge to the one ballot overruled by the Regional Director should also be set down for hearing. Pet. App. C4.

The administrative law judge (ALJ) issued his decision on March 17, 1983, sustaining the remaining ballot challenges and most of the election objections (Pet. App. C4; 279 N.L.R.B. at 592-597). The ALJ found that seven employees challenged by Local One had been hired by petitioner "in order to 'pack the unit' and thereby dilute [Local One's] strength in [the representation] election" (279 N.L.R.B. at 596).[3] Noting also the challenges resolved in Local One's favor by the Regional Director, the ALJ stated that petitioner's conduct exhibited an intent "to hinder and frustrate at every opportunity the wishes of its unit employees" (*ibid.*). Having found that Local One received a majority of the valid votes, the ALJ recommended that it be certified as the bargaining representative of the unit employees (*id.* at 598). In the consolidated unfair labor practice proceeding, the ALJ further found, inter alia, that petitioner had unlawfully laid off, disciplined and otherwise discriminated against employees because of their support of Local One, and that petitioner had changed its method of operations and augmented its work force in order to dilute support for Local One, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (3). 279 N.L.R.B. at 582-583, 590-591, 595-598.

On April 28, 1986, the Board adopted the ALJ's findings that petitioner had engaged in unfair labor practices to discourage support of Local One, and determined that petitioner had further violated Section 8(a)(1) of the Act by soliciting employee support for Local 363 and threatening to discharge employees and close the plant if the employees supported Local One. 279 N.L.R.B. 576-577.

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[3] The ALJ sustained the Board's ballot challenge, finding that the voter at issue had voluntarily terminated his employment with petitioner. 279 N.L.R.B. at 592.

The Board also adopted the ALJ's recommendation with respect to the challenged ballots and certified Local One. Pet. App. C4; 279 N.L.R.B. 576, 577.

Petitioner filed a motion for reconsideration of the Board's decision to sustain the challenges to some of the disputed ballots, and further contended that the certification of Local One was inappropriate because five years had passed since the election, only 2 of the 20 employees in the bargaining unit at the time of the election were still in petitioner's employ, and Local One did not necessarily have the support of a majority of the current unit employees. Pet. App. C5. The Board denied the motion for reconsideration. *Ibid.*

2. On June 24, 1986, Local One requested that petitioner bargain with it. Petitioner refused to do so. Local One filed an unfair labor practice charge, and, on June 24, a complaint issued alleging that petitioner's refusal to bargain violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). Pet. App. C2, C8. The Board granted summary judgment and ordered petitioner to bargain on request with Local One. Pet. App. C1-C11.[4]

The Board rejected (Pet. App. C5) petitioner's contention "that it can legitimately refuse to bargain based on the 5-year hiatus between the representation election and certification in light of the significant employee turnover." It found (*id.* at C6 n.5) that the circumstances relied on "do not constitute 'unusual circumstances' within the meaning of *Ray Brooks* v. *NLRB*, 348 U.S. 96 (1954)," which

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[4] The Board directed that the certification year, during which the union would enjoy an irrebuttable presumption of majority status, should commence on the date good faith bargaining began (Pet. App. C6 n.5). See *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962); *Lamar Hotel*, 140 N.L.R.B. 226, 229 (1962), enforced, 328 F.2d 600 (5th Cir.), cert. denied, 379 U.S. 817 (1964); *Burnett Constr. Co.*, 149 N.L.R.B. 1419, 1421 (1964), enforced, 350 F.2d 57 (10th Cir. 1965).

would relieve petitioner of its obligation to bargain with the union certified by the Board after winning "the majority of the valid ballots cast in a fair election." The Board distinguished cases in which courts of appeals had refused to enforce bargaining orders because of the passage of time and employee turnover, noting that those bargaining orders had followed Board determinations that a fair election could not be held, not, as in this case, an order to bargain with a union certified on the basis of a Board election, which is "the clearly preferred method for determining a majority representative" (Pet. App. C6 n.5).

3. The court of appeals enforced the Board's bargaining order with one modification (Pet. App. A1-A8).[5] The court rejected petitioner's argument that "the Board's order should not be enforced because the passage of time between the certification election and the high turnover of employees in the bargaining unit have cast doubt upon the majority status of Local One" (*id.* at A4). The court observed that it had previously held, in *NLRB* v. *Patent Trader, Inc.*, 426 F.2d 791, 792 (2d Cir. 1970) (en banc), that delay in certification and the union's intervening loss of majority status do not justify a court of appeals' refusal to enforce a bargaining order when " 'there has been a Board election, the Union was duly certified, and the [employer] thereafter refused to bargain in good faith.' " Pet. App. A5 (quoting *Patent Trader*, 426 F.2d at 792). " 'Requiring still another Board election,' " the court held, " 'undermines the central purpose of the National Labor Relations Act, since it gives an employer an incentive to disregard its duty to bargain in the hope that over a period of time a union will lose its majority status.' " *Ibid.*

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[5] The court required the Board to give "actual notice to the current employees of their statutory right to petition for a decertification election." Pet. App. A8, B5.

(quoting *Patent Trader,* 426 F.2d at 792). While deeming "egregious" the administrative delay between the election and Local One's certification (Pet. App. A2, A4), the court, citing its decision in *Glomac Plastics, Inc.* v. *NLRB,* 592 F.2d 94, appeal after remand, 600 F.2d 3 (1979), which involved a similar situation, said that the administrative delay did not remove this case from the rule established in *Patent Trader* (Pet. App. A5-A6).

The court declined (Pet. App. A7) to remand the matter to the Board to reconsider the appropriateness of the remedy, as it had done in *Glomac Plastics,* 592 F.2d at 103.[6] The court concluded that, in this case, the Board had already considered and rejected petitioner's contention that the passage of time and employee turnover constituted "unusual circumstances" relieving it of the duty to bargain in good faith during the certification year.

ARGUMENT

The court of appeals' decision is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner asserts (Pet. 7-9) that, due to employee turnover that occurred during administrative delay in the certification process, Local One may not be the choice of a majority of its current employees. Therefore, petitioner

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[6] *Glomac* involved a bargaining order issued almost six years after an election and certification. On remand, the Board accepted as accurate the employer's claims of "substantial employee turnover in the unit and/or abandonment of the unit by the Union" (Pet. App. A6). The Board determined, in the exercise of its discretion, that a bargaining order nevertheless remained appropriate to effectuate the purposes of the Act. 241 N.L.R.B. 348 (1979). The court of appeals enforced the order. *NLRB* v. *Glomac Plastics, Inc.,* 600 F.2d 3, 4 (2d Cir. 1979).

argues, enforcement of the bargaining order impermissibly interferes with the rights of its current employees under Section 7 of the Act, 29 U.S.C. 157, to select their own bargaining representative. This Court, however, has consistently held that it is within the Board's remedial discretion to require an employer to bargain for a reasonable time with a union certified on the basis of a valid election even though the union had lost its majority status. In *Brooks* v. *NLRB,* 348 U.S. 96 (1954), the union had lost its majority prior to certification through no fault of the employer. The Court nonetheless rejected the employer's effort, similar to petitioner's, "to vindicate the rights of his employees to select their bargaining representative" by refusing to honor the certification of the Union. *Id.* at 103. The Court explained that the "underlying purpose of [the] statute is industrial peace"; "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." *Ibid.* See *Fall River Dyeing & Finishing Corp.* v. *NLRB,* No. 85-1208 (June 1, 1987), slip op. 9-11.[7]

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[7] Petitioner's assertion (Pet. 8, 11) that "[b]argaining orders are so inimical to free choice" and are "drastic remed[ies]" has no application in this context. In *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969), the Court, while affirming the Board's authority to issue bargaining orders on the basis of authorization card majorities, recognized that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support" (*id.* at 602 (footnote omitted)). Accordingly, before issuing a bargaining order on the basis of authorization cards, the Board must find that the employer's unfair labor practices have so diminished the likelihood of a fair election that a bargaining order would, on balance, better protect the employee sentiment once expressed through cards. *Id.* at 614-615. Here, in contrast, the "preferred method"—a Board election—has been used, and there is nothing "drastic" about the Board's bargaining order, which is based squarely

2. Petitioner's assertion (Pet. 11-12) that *Brooks* applies only where the certification was timely issued and not where, as here, there was a long delay between the election and the issuance of the certification is erroneous. *Brooks* recognized that the issuance of a certification might often be delayed by the need to resolve objections to the conduct of the election or challenged ballots, and for that reason sustained the Board's view that the year period during which a union majority status is ordinarily immune from attack "should run from the date of [the] certification rather than the date of [the] election." 348 U.S. at 104. Nor is it material that the delay here may in part be attributable to the Board.[8] In *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962), the Court rejected the contention that enforcement of a bargaining order should be denied or conditioned on the holding of a new election because of the Board's delay in issuing the order and the affected em-

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on the results of that election. Moreover, even in the context of a bargaining order based on authorization cards, the Court in *Gissel* upheld the Board's discretion to issue a bargaining order even though it might not reflect the current wishes of the employees. *Id.* at 612-613.

[8] Petitioner erroneously suggests (Pet. 10, 11) that it had no responsibility for the delay in the union's certification, that "the Union's majority status was questionable long before the Company refused to bargain," and that it had "merely exercised its statutory right to administrative review and due process." However, the "questions" as to the union's majority status were largely attributable to disputed ballots cast, as the Board found, by employees unlawfully hired by petitioner for the express purpose of diluting the union's majority, and by ineligible supervisory employees, acting on petitioner's directions. 279 N.L.R.B. at 595-597. The union received a majority of the eligible votes notwithstanding unlawful conduct by petitioner that would have required a new election had the union failed to prevail. *Id.* at 49. Petitioner's present concern for employee free choice is the latest means of expressing its longstanding opposition to representation of its employees by Local One.

ployees' subsequent repudiation of the union. As the Court explained, "[i]nordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10(b)."[9]

Contrary to petitioner's assertion (Pet. 8-9), enforcement of the Board's bargaining order does not ignore the rights of the current employees who may not want the Union as their bargaining representative. "[A] bargaining relationship 'once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed,' after which the 'Board may, . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.' " *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613 (1969) (quoting *Franks Bros.* v. *NLRB*, 321 U.S. 702, 705-706 (1949)). Moreover, to ensure that petitioner's employees would be apprised of their statutory right to change their bargaining representative at an appropriate time, the court of appeals required the Board to give the employees actual notice of that right.[10]

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[9] As authority for that conclusion, *Katz* cited *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 568 (1950), *Franks Bros.* v. *NLRB*, 321 U.S. 702 (1949), and *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512, 513 (1941), cases in which the Board had determined that a bargaining order was appropriate notwithstanding the union's asserted loss of majority status.

[10] The notice provision is set forth at Pet. App. B5. Petitioner complains (Pet. 12) that the notice is illusory because it informs the employees of a right which they cannot exercise immediately. That argument merely takes issue with the holding of *Brooks* and its progeny that a certified union is entitled to an irrebuttable presumption of majority status for one year following certification, and that, if the employer refuses to bargain with the certified union, the Board may extend the certification year so that it does not commence until the employer begins to bargain in good faith.

3. Finally, petitioner asserts (Pet. 14-15) that the court of appeals' refusal to remand the bargaining order to the Board to redetermine its current appropriateness is inconsistent with *NLRB* v. *H.P. Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974), and *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104 (1st Cir. 1982). Those decisions, however, are inapposite. Unlike this case, in *Hood* the lengthy administrative processes were not the result of an employer's unfair labor practices, but involved a difficult conflict of interest question which had resulted in several Board and court proceedings. 496 F.2d at 516-517; see *id.* at 520 ("This delay, unlike that in many cases, cannot be attributed to the tactics of [the employer]."). Moreover, in *Hood,* the Board itself had suggested the remand, and the court of appeals agreed with the Board that further consideration was appropriate. 496 F.2d at 520. In *St. Regis Paper,* the bargaining order was based on a finding that a new group of employees had been accreted to the existing bargaining unit, not, as in this case, on a certification of election results. 674 F.2d at 106. Moreover, in that case the facility involved had closed down. The court of appeals found that those "unusual circumstances" required the Board to reconsider the appropriateness of its bargaining order. *Id.* at 109. In neither case did the First Circuit adopt a rule of law that a remand for further consideration is necessary whenever there is a delay in administrative proceedings. Accordingly, the court of appeals' fact-bound conclusion in this case that no purpose would be served by a remand raises no issue of general importance meriting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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